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Supreme Court, U.S.
FILED
JAN 4 - 2005
OFFICE OF THE CLERK

No. 03-1693

In the Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY; LOUANNE WALKER; DAVE HOWE; LAWRENCE DURHAM; PAUL LEE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN ATHEISTS IN SUPPORT OF THE RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

STATEMENT OF INTERESTS OF *AMICUS CURIAE*..... 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT..... 4

I. THE PETITIONERS' DISPLAY OF THE TEN COMMANDMENTS VIOLATES THE VALID SECULAR PURPOSE REQUIREMENT OF THE ESTABLISHMENT CLAUSE REGARDLESS OF ANY ALLEGED SECULAR CONTENT OR CONTEXT..... 4

II. THE PETITIONERS' DISPLAY OF THE TEN COMMANDMENTS UTTERLY FAILS TO PASS CONSTITUTIONAL MUSTER AS AN ENDORSEMENT OF RELIGION CONSIDERING ITS CONTENT AND CONTEXT..... 11

CONCLUSION..... 14

APPENDIX..... A-1

Letter of consent by Petitioner's counsel..... A-1
Letter of consent by Respondent's counsel..... A-2

TABLE OF AUTHORITIES

CASES: Page

ACLU v. McCreary County, Kentucky, 354 F.3d 438 (6th Cir. 2003)..... 6, 7, 8, 9, 10

Capitol Square Review and Advisory Bd. v. Pinnette, 515 U.S. 753 (1995)..... 13

County of Allegheny v. ACLU of Pittsburgh, 492 U.S. 573 (1989)..... 11, 12, 13

Edwards v. Aguillard, 482 U.S. 578 (1987)..... 4, 5, 9, 10

Grand Rapids v. Ball, 473 U.S. 373 (1985)..... 12

Lemon v. Kurtzman, 403 U.S. 602 (1971)..... *passim*

Lynch v. Donnelly, 465 U.S. 668 (1984)..... 4, 14

Meuller v. Allen, 463 U.S. 388 (1983)..... 4

Murray v. Curlett, 228 Md. 239, 179 A.2d 268 (1962).. 1

Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290 (2000)... 10, 12

School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963)..... 1

Stone v. Graham, 449 U.S. 39 (1980)..... 5, 6, 7, 12

Wallace v. Jaffree, 472 U.S. 38 (1985)..... 5, 12

OTHER AUTHORITIES:

Atheism, Madalyn Murray O'Hair, American Atheists, at http://www.atheists.org/Atheism/atheism.html (last visited December 9, 2004)..... 1-2

CONSTITUTIONAL PROVISIONS:

1st Amendment, U.S. Constitution..... 3, 9

14th Amendment, U.S. Constitution..... 3

INTEREST OF AMICUS CURIAE[1]

American Atheists is a volunteer organization active in protecting the rights of Atheists and promoting tolerance and understanding of the Atheist viewpoint. Founded in 1963 by Madalyn Murray O'Hair,[2] for over thirty years American Atheists has been dedicated to the separation of church and state and a tireless advocate of the Atheist cause.[3] American Atheists' perspective is rooted in the philosophy of materialism, "which holds that nothing exists but natural phenomenon."[4]

> The indestructible foundation of the whole edifice of Atheism is its philosophy, materialism, or naturalism, as it is also known. That philosophy regards the world as it actually is, views it in the light of the data provided by progressive science and social experience.

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[1] The parties have consented to the filing of this brief. A copy of the letter of consent of the Petitioner and Respondent is included in the Appendix. Counsel for American Atheists authored this brief in its entirety. No person or entity, other than American Atheists, its supporters or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Ms. O'Hair founded American Atheists following the United States Supreme Court ruling in School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963), overturning the Maryland Court of Appeals' approval of public school bible readings in her case, Murray v. Curlett, 228 Md. 239, 179 A.2d 698 (1962).

[3] Ms. O'Hair and American Atheists' work includes the founding of the first known Atheist library and archives in the United States, production of American Atheist Forum, the first regularly scheduled television program produced, directed, and broadcast by Atheists, founding of the American Atheist Press, the American Atheist magazine, and the American Atheist Radio Series, and countless other cultural and legal contributions to the Atheist cause.

[4] Madalyn Murray O'Hair, Atheism, American Atheists, at http://www.atheists.org/Atheism/atheism.html (last visited December 9, 2004).

> Atheistic materialism is the logical outcome of scientific knowledge gained over the centuries.[5]

No gods, spirits, fairies, or other imagined entities pull at the strings of humanity. The materialist philosophy of Atheism promotes a positive viewpoint and provides the impetus to effect change.

> Materialism liberates us, teaches us not to hope for happiness beyond the grave but to prize life on earth and strive always to improve it. Materialism restores to man his dignity and his intellectual integrity. Man is not a worm condemned to crawl in the dust, but a human being capable of mastering the forces of nature and making them serve him. Materialism compels faith in the human intellect, in the power of knowledge in man's ability to fathom all the secrets of nature and to create a social system based upon reason and justice. Materialism's faith is in man and his ability to transform the world by his own efforts. It is a philosophy in every essence optimistic, life-asserting, and radiant. It considers the struggle for progress as a moral obligation, and impossible without noble ideals that inspire men to struggle, to perform bold, creative work.[6]

Given American Atheists' unswerving dedication to the Atheist cause for over three decades, American Atheists submits this brief in support of Respondents and urges the Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

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[5] Id.
[6] Id.

SUMMARY OF THE ARGUMENT

The two courthouse displays of the Ten Commandments among other documents consisting of the Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, Lady Justice, (hereinafter "Secularizing Documents"), and a one page prefatory document alleging a foundational role of the Ten Commandments in the Declaration of Independence and our legal tradition, violate the prohibition of the Establishment Clause of the First Amendment that "Congress shall make no law respecting an establishment of religion," as applied to the states through the Fourteenth Amendment. No plausible reason justifies the endorsement and promotion of the sacred text of Judaism and Christianity by including it among the Secularizing Documents other than the endorsement of a particular set of religious beliefs. As a result, the courthouse displays lack a valid secular purpose under the first Lemon prong.

In addition, the lack of a demonstrated relevance of the Ten Commandments to the Secularizing Documents or to any other overarching secular theme is sufficiently likely to be perceived by adherents of the Ten Commandments as an endorsement, and by nonadherents as a disapproval, of their individual religious choices. As a result, the Ten Commandments courthouse displays violate the second prong of Lemon. Amicus curiae American Atheists respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I. THE PETITIONERS' DISPLAY OF THE TEN COMMANDMENTS VIOLATES THE VALID SECULAR PURPOSE REQUIREMENT OF THE ESTABLISHMENT CLAUSE REGARDLESS OF ANY ALLEGED SECULAR CONTENT OR CONTEXT.

To satisfy the first prong of Lemon, a challenged statute "must have a secular legislative purpose." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). This prong is violated if the statute is "motivated wholly by an impermissible purpose." Lynch v. Donnelly, 465 U.S. 668, 680 (1984). While courts are normally deferential to government's articulation of secular purpose, close examination is important to reveal insincere or sham purposes. Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987). Government action lacks a secular purpose when the primary purpose is a religious one. Id., at 594. This is especially true "[w]hen both courts below are unable to discern an arguably valid secular purpose." Id., n. 15. There is a reluctance to attribute unconstitutional motives to the states when there is "a plausible secular purpose ... discernable on the face of the statute." Meuller v. Allen, 463 U.S. 388, 394-95 (1983). But where a legislature has a pre-eminent religious purpose in enacting a statute, a court need not be blind to that purpose, even where the legislature proffers a secular purpose. Edwards, 482 U.S. 578, 589-590.

> It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to

> the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice.

Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring). "This intention may be evidenced by promotion of religion in general, . . . or by advancement of a particular religious belief." Edwards, 482 U.S. 578, 585. Thus, in addition to insincerity or sham of the stated purpose, the lack of a secular purpose may be found on the face of a statute by the (1) implausibility of the proffered purpose, (2) promotion of religion in general, or (3) advancement of a particular religious belief. In this case, the proffered secular purpose is implausible, promotes religion in general, and advances a particular religious belief.

This Court has already unequivocally determined the religious nature of the Ten Commandments. In Stone v. Graham, 449 U.S. 39 (1980), this court was faced with an "avowed" secular purpose recited in the text of the law requiring their posting on the schoolhouse wall, and in small print at the bottom of each display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Id., at p. 40. The Ten Commandments' religious content was held to be unmistakable when this Court held that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian Faiths and no legislative recitation of a supposed secular purpose can blind us to that fact." Id., at p. 41. The Court referred to the alleged partial secular content of the Decalogue as merely "arguable":

> The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5: 6-15.

Id., at pp. 41-42 (footnote omitted). As a result, this Court in Stone rejected the avowed secular purpose as facially implausible. Id.

The secular purposes for the displays enunciated by Petitioners in the proceedings below consist of (1) to erect a Ten Commandments display consistent with the Establishment Clause; (2) to demonstrate that the Ten Commandments have a foundational role in American law and government; (3) to demonstrate the significance of the Ten Commandments in providing the moral background for the Declaration of Independence and the foundation of our legal tradition; and (4) to educate citizens about the foundational role of the Ten Commandments in the law and government. ACLU of Kentucky v. McCreary County, Kentucky, 354 F.3d 438, 446-447. Petitioners' merits brief articulates several allegedly secular purposes, i.e., "to educate about law," Brief For Petitioners, at p. 5; educating the public about "some documents that played a role in the foundation of our system of law and government," id., at p. 9; the "purpose is … to post a Display about law." id., at p. 10; "The Display is about law, not religion," id., at p. 11; "educating the public

about some of the documents that influenced American Law and government." id., at p. 16.

Because none of the proffered purposes articulated by the Petitioners for the displays of the Ten Commandments are a valid secular purpose, the displays must be invalidated under the first Lemon prong. First, the desire of the Petitioners to comport their conduct with the requirements of the Establishment Clause is not a valid secular purpose under Lemon. Indeed, all government action is required to comport with the law, and the acceptance of this as a valid purpose under the first Lemon prong would render it a nullity.

Second, purposes two, three, and four, proffered in the proceedings below, to demonstrate the foundational role of the Ten Commandments in American law, government, and the Declaration of Independence, also fail the secular purpose test of the first Lemon prong. Because the displays fail to incorporate the Ten Commandments into an overarching secular context, this Court's decision in Stone, supra, is dispositive. In Stone, the Court opined that the Ten Commandments might be a constitutionally acceptable part of a course of study of "history, civilization, ethics, comparative religion, or the like," however, "[p]osting of religious texts on the wall serves no such educational function." 449 U.S. 39, 42 (1980).

An examination of the content of the displays reveals a lack of a nexus between the Ten Commandments and the proffered secular purpose, which is the alleged foundational role of the Ten Commandments in American law, government, and the Declaration of Independence. The contents of the displays reveal no connection between the admonitions contained in the Ten Commandments and the contents of any of the other Secularizing Documents. None

of the Secularizing Documents is related to the portion of the Ten Commandments that specify the religious duties owed to a god. Neither is there any relation between the Ten Commandments' admonitions against dishonoring parents, stealing, killing, bearing false witness, and coveting, on the one hand, and the contents of the Secularizing Documents.

In addition, the foundational role of the Ten Commandments in American law, government, and the Declaration of Independence is likewise unspecified in the record below. ACLU of Kentucky v. McCreary County, Kentucky, 354 F.3d 438, 452-453. Indeed, which law of Kentucky or elsewhere derives from the commandment "Remember the Sabbath day to keep it holy," which presumably includes requiring slave owners to give them a day off? Which laws of Kentucky or elsewhere derive from the commandment that we don't have freedom to express anti-theistic opinions or that we are to not covet our neighbor's wife? Nowhere do the Ten Commandments prohibit slavery, drunken driving, or father-daughter incest. They set no useful health standards, no monetary or judicial criteria, and no social service standards. They are useless in matters of probate, contract law, human/civil rights, and constitutional law. Of the Ten Commandments, four address themselves to how and when to worship the proper gods, and two concern women simply as pieces of property. Nowhere in the Declaration of Independence are there any admonitions found in the Ten Commandments or anything colorably related to them.

Moreover, three of the Ten Commandments are contrary to the United States Constitution thus negating the claim that they are the foundations of our laws. The commandment that "thou shalt have no other gods before me"

is directly contrary to the Establishment Clause of the First Amendment. The commandments that "Thou shalt not make unto thee any graven image," and "Thou shalt not take the name of the LORD thy God in vain" are in direct opposition to the guarantees of freedom of speech and expression in the First Amendment. The first four commandments speak to "pleasing a god." The Declaration Of Independence speaks of just the opposite: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

The Sixth Circuit opinion found it significant that neither the defendants nor the dissent attempted to buttress the historical claim that the Ten Commandments have a foundational role in the law or the Declaration of Independence. ACLU of Kentucky v. McCreary County, Kentucky, 354 F.3d 438, 452. Government action lacks a secular purpose when the primary purpose is a religious one, especially "[w]hen both courts below are unable to discern an arguably valid secular purpose." Edwards, 482 U.S. 578, 594 n. 15. When both courts below have been unable to discern an arguable secular purpose, when the contents of the display fail to show any connection between the Ten Commandments and an arguably secular purpose, and when the proponents of the displays are unable to articulate a nexus between the Ten Commandments and any arguably secular purpose for the displays, this Court must presume that such a nexus and connection does not exist and that there is no secular purpose in including the Ten Commandments in the displays among the Secularizing Documents.

The alleged secular purposes that are proffered in the Brief For Petitioners also fail the Lemon purpose prong for a number of reasons. First, the Petitioners' shifting statements

of the purpose of the displays throughout the course of the proceedings below and in their merits brief, evinces an insincerity of the avowed purposes. By adopting shifting secular purposes Petitioners have cast doubt on their sincerity. Moreover, they have effectively denied the lower courts the opportunity to pass upon their claim under the Lemon purpose prong.

Second, assuming that Petitioners' avowed purpose is to educate about both religious law and secular law under the generic topic of "law," Petitioners' selection of the sacred religious text of the Judeo Christian tradition as the only example of religious law, belies the avowed purpose. Brief for Petitioners, at p. 5 ("The Display is about law and . . . the Decalogue is law"); Id., at p. 11 ("The Display is about law, not religion. The Ten Commandments are law...")

Third, the history of the display casts doubt upon the current avowed purpose. This Court has specifically looked to the history of the challenged government action to determine its purpose. Santa Fe Ind. School Dist. v. Doe, 530 U.S. 290, 315 ("This history indicates that the District intended to preserve the practice of prayer before football games.") The history of the courthouse displays indicates a purpose of inclusion of the Ten Commandments above all, and camouflaging them by inclusion among the Secularizing Documents.

Fourth, the displays also fail this Court's secular purpose prohibitions against promotion of religion in general and advancement of a particular religious belief. Edwards, supra. The displays purport to present the King James Version of the Ten Commandments. ACLU of Kentucky v. McCreary County, Kentucky, 354 F.3d 438, 443 n. 2. Thus, it cannot be denied that the displays promote and advance a

particular religious belief. As a result, the displays' promotion of either religion in general or the advancement of a particular religious belief compels a finding that they lack a valid secular purpose. For the foregoing reasons, the displays at it issue fail the secular purpose prong of Lemon and must be enjoined under the Establishment Clause.

The decision of the United States Court of Appeals for the Sixth Circuit must be affirmed under the first Lemon prong.

II. THE PETITIONERS' DISPLAY OF THE TEN COMMANDMENTS UTTERLY FAILS TO PASS CONSTITUTIONAL MUSTER AS AN ENDORSEMENT OF RELIGION CONSIDERING ITS CONTENT AND CONTEXT.

In evaluating the government's use of religious symbolism under the second Lemon prong, the Supreme Court has held that it "must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.'" County of Allegheny v. ACLU of Pittsburgh, 492 U.S. 573, 597 (1989).

> A public school's sponsorship of a religious message is impermissible under the establishment of religion clause of the Federal Constitution's First Amendment, because such sponsorship sends (1) the ancillary message to members of the audience who are nonadherents that they are outsiders and not full members of the political community; and (2) an accompanying message to adherents that they are

insiders and favored members of the political community.

Santa Fe Ind. Such. Dist. v. Doe, 530 U.S. 290, 309-310 (2000); See also, County of Allegheny, 492 U.S. 573, 593-597 (1989) (citing Wallace v. Jaffree, 472 U.S. at 70 (O'Connor, J., concurring in the judgment)) and Grand Rapids v. Ball, 473 U.S. 373, 389-392 (1985)). The analytical task under County of Allegheny, supra, is to determine whether the religious symbol "in [its] 'particular physical setting[],' has the effect of endorsing or disapproving religious beliefs." County of Allegheny, 492 U.S. 573, 597 (1989).

In Stone, supra, this Court relied upon the lack of the Ten Commandments' integration into the school curriculum in an otherwise secular context for the appropriate secular study of history, civilization, ethics, comparative religion, or the like. Id., at 42. It held that the posting of the texts on the wall "serves no such educational function." Id. Here, although the petitioners attempt to articulate arguably secular purposes for the displays, petitioners make no attempt to explain how the Ten Commandments are related to the purpose of the displays. Indeed, there is nothing obvious in the text of the Ten Commandments that in any way suggests a relation to the Secularizing Documents or to any other overarching secular theme.

Just as this Court held in Stone that posting the text on the school house wall served no educational function, the displays of the Ten Commandments bear no rational relationship to the Secularizing Documents or the proffered secular purposes. Indeed, the placement of the Ten Commandments among the Secularizing Documents indicates that the government places this religious text on a par with the

other indisputably important foundational and historical icons of our government and law. Such an endorsement of what is indisputably an important religious text serves to convey the message to adherents of the Ten Commandments of government endorsement of their religious choices, and to nonadherents of government disapproval of their individual religious choices.

This Court has not adopted the reasonable observer acquainted with the text, legislative history, and implementation of the statute standard of Justice O'Connor's concurrence in Capitol Square, a case involving a government limited forum, for government religious displays. Cf., 515 U.S. 753, 779-780 (O'Connor, J., concurring in part and concurring in judgment) and 515 U.S. 753, 797-807 (Brennan, J., dissenting). Indeed, Justice O'Connor's reasonable observer who is so acquainted standard appears to be mostly impractical of application. How much research must the reasonable observer undertake to discover the legislative or other history of the displays, the rationale for the location of their placement, or the shifting arguably secular purposes proffered by their proponents? Apparently, under Justice O'Connor's reasonable acquainted observer standard, the research must be exhaustive. However, the failure of Justice O'Connor's reasonable observer to have fully acquainted herself with the legislative and other history of a government religious display bears no relationship to the "perce[ption] by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." County of Allegheny, 492 U.S. 573, 597. Indeed, this Court's "adherent/nonadherent" perceptions test for endorsement is the one most consonant with the purposes of the Establishment Clause.

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). Status in the political community should not and does not depend upon conducting the exhaustive research into legislative history and motives that Justice O'Connor's reasonable acquainted observer standard would impose.

As a result, the displays violate the second prong of Lemon and must be enjoined under the Establishment Clause. The decision of the United States Court of Appeals for the Sixth Circuit must be affirmed under the second Lemon prong.

CONCLUSION

The Ten Commandments courthouse displays, because they bear no plausible relationship to the Secularizing Documents or to any overarching secular theme, violate the purpose prong of Lemon. In addition, the displays are lacking in any secular context that would cause a reasonable observer to perceive anything but the government's endorsement or disapproval of the religious beliefs contained in the Ten Commandments. Amicus curiae American Atheists respectfully requests that the United States Court of Appeals for the Sixth Circuit be affirmed.

Dated: January 4, 2005

Respectfully submitted,

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November 23, 2004

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Re: ACLU of Kentucky, et al v.
McCreary County, Kentucky and
Pulaski County, Kentucky, et al.
Ref. No: 34-143
Case No: 99-507
Appeal: 01-5935
SC No: 03-1693

Dear Mr. Bruno:

This letter serves as consent to file an amicus brief in the case of *McCreary County, et al. v. ACLU of Kentucky, et al.*

Sincerely,

s/
Erik W. Stanley

EWS:clm

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November 22, 2004

Sent by fax (202/479-3230)

Hon. William K. Suter, Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: *McCreary County, Kentucky v.*
American Civil Liberties Union of Kentucky
Case No. 03-1693

Dear Gen. Suter:

I am counsel of record for the respondents, American Civil Liberties Union of Kentucky, *et al.* We hereby globally consent to the filing of all *amicus curiae* briefs in this case.

Thank you for your consideration in this matter. Please feel free to contact me if you have any questions.

Yours truly,

s/_____
David A. Friedman
General Counsel

DAF/ms